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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

IMMIGRATION & NATURALIZATION SERVICE, et al.
Petitioners,

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, et al.
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Deference to the INS's interpretation of 8 U.S.C. § 1252(a)(1) is neither required nor appropriate under the circumstances of this case 3

A. *Chevron* Does Not Apply Under the Circumstances of this Case 4

1. The *Chevron* standard 4

2. *Chevron's* deference requirement applies only to some kinds of interpretive questions and only under some circumstances 5

3. *Chevron* does not require deference to an agency assessment of its own authority .. 7

4. *Chevron* only requires deference where the circumstances warrant deference to the agency interpretation 13

5. The circumstances of the present case do not warrant deference to the INS's interpretation of § 1252(a)(1) 14

6. Conclusion 17

B. Even if *Chevron* does apply under the circumstances of this case, deference should not be afforded to the INS's interpretation of § 1252(a)(1) because Congress' intent is clear 17

1. The statutory language 19

TABLE OF CONTENTS – *(Continued)*

Page

2. Section 1252(a)(1)'s role in the Immigration and Nationality Act as a whole and the legislative history 24

C. Even if the Court concludes that § 1252(a)(1) is ambiguous with respect to the Attorney General's authority to impose a blanket condition unrelated to assuring appearance at the hearing, the INS's interpretation should be rejected as impermissible and unreasonable 25

CONCLUSION 28

CERTIFICATE OF SERVICE 29

TABLE OF AUTHORITIES

Cases: Page

Adams Fruit Co. v. Barrett, 110 S. Ct. 1384 (1990) 11

Bethesda Hosp. Ass'n v. Bowen, 485 U.S. 399 (1988) 18

Board of Governors v. Dimension Financial Corp., 474 U.S. 361 (1986) 4

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) 13, 14

Bowsher v. Synar, 478 U.S. 714 (1986) 12

Carlson v. Landon, 342 U.S. 524 (1952) 20, 23

Chemical Mfrs. Ass'n v. NRDC, 470 U.S. 116 (1985) 17

Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ..... passim

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 11

Commodities Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) 8

Connecticut Dep't of Income Maintenance v. Heckler, 471 U.S. 524 (1985) 7, 14

Dames & Moore v. Regan, 453 U.S. 654 (1981) ... 13

DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568 (1988) . 26

Department of the Treasury, *IRS v. FLRA*, 110 S. Ct. 1623 (1990) 10

Department of Transp. v. Paralyzed Veterans, 477 U.S. 597 (1986) 7

Dole v. United Steelworkers of America, 110 S. Ct. 929 (1990) 8, 17

Cases: Page

EEOC v. Commercial Office Products Co., 486 U.S. 107 (1988) 14

FDIC v. Philadelphia Gear Corp., 476 U.S. 426 (1986) 14

Heckler v. Campbell, 461 U.S. 458 (1983) 22

Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408 (7th Cir. 1987)..... 5

In re Milburn, 34 U.S. (9 Pet.) 704 (1835) 21

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) . 4, 5, 6, 9, 13, 14, 18, 22

INS v. Chadha, 462 U.S. 919 (1983)..... 12

INS v. Lopez-Mendoza, 468 U.S. 1032 (1989)..... 26

INS v. Stevic, 467 U.S. 407 (1984) 9

Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986)..... 18

John Doe I v. Meese, 690 F. Supp. 1572 (S.D. Tex. 1988) 27

K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) 18

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 12

Matter of Andrade, 19 I&N Dec. 488 (1987)..... 15

Matter of Patel, 15 I&N Dec. 666 (1976)..... 15

Matter of Shaw 17 I&N Dec. 177 (1979)..... 15

Matter of Spiliopoulos, 16 I&N Dec. 561 (1978)... 15

Matter of Toscano-Rivas, 14 I&N Dec. 523 (BIA, 1973)(AG 1974)..... 15, 16

Cases: Page

McNary v. Haitian Refugee Center, 111 S. Ct. 888 (1991) 8, 9

Mississippi Power & Light v. Mississippi ex rel. Moore 487 U.S. 354 (1988) 7, 8

Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983)..... 16

National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350 (9th Cir. 1990) . 9, 22, 24, 25, 26

NLRB v. City Disposal Systems, 465 U.S. 822 (1984) 8

NLRB v. United Food & Commercial Workers' Union, 484 U.S. 112 (1987) 7, 14

Pauley v. Bethenergy Mines, Inc., 59 U.S.L.W. 4778 (June 25, 1991)..... 14

Ramos v. Thornburgh, 732 F. Supp 609 (E.D. Tex 1989) 27

Regents of Univ. of Cal. v. Public Employment Rel. Bd. 485 U.S. 589 (1988) 18

Reynolds v. United States, 80 S. Ct. 30 (1959).... 21

Rubenstein v. Brownell, 206 F.2d 449 (D.C. Cir. 1953) 21

Sullivan v. Everhart, 110 S. Ct. 960 (1990)..... 18

Sullivan v. Zebley, 110 S. Ct. 885 (1990)..... 23

United States v. Boyle, 469 U.S. 241 (1985)..... 7

United States v. City of Fulton, 475 U.S. 657 (1986) 18

United States v. Eichman, 110 S. Ct. 2404 (1990). 12

United States v. Nixon, 418 U.S. 683 (1974) 12

Cases: Page

United States v. Riverside Bayview Homes, Inc. 474 U.S. 121 (1985) 25

Yanish v. Barber, 73 S. Ct. 1105 (1953) 20, 21

Young v. Community Nutrition Inst. 476 U.S. 974 (1986) 14

Youngstown Sheet & Tube Co. v. Sawyer 343 U.S. 579 (1952) 12, 13

STATUTES AND REGULATIONS:

8 U.S.C. § 1101 ..... 4, 24

8 U.S.C. § 1160(e) 9

8 U.S.C. § 1252 3

8 U.S.C. § 1252(a)(1) ..... passim

8 U.S.C. § 1252(c) 20

8 U.S.C. § 1324a 24

8 U.S.C. § 1324a(b)(1)(C) 24, 25

8 U.S.C. § 1324a(e), (f) 25

8 C.F.R. § 2.1 4

8 C.F.R. § 103.6(a)(2)(ii) 27

8 C.F.R. § 274(a)(1)(ii) 27

8 C.F.R. § 274a.12(c)(13) 27

8 C.F.R. § 274(e) 27

48 Fed. Reg. 51142 24

Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 ..... 9, 24

Page

LEGISLATIVE HISTORY:

H.R. Rep. No. 1192, 81st Cong., 1st Sess. (1949) 22

S. Rep. No. 2239, 21st Cong., 2d Sess. (1950) 22

OTHER AUTHORITIES:

Anthony, *Which Agency Interpretations Should Get Judicial Deference? – A Preliminary Inquiry,* 40 Admin. L. Rev. 121 (1988) 5

Black's Law Dictionary, (5th ed. 1979) 19, 22

Scalia, *Judicial Deference to Administrative Interpretations of Law,* 1989 Duke L.J. 51 ..... 11, 17

Schwartz, B. *Administrative Law,* 10 (3rd ed. 1991) 5, 6

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Starr, *Judicial Review in the Post-Chevron Era,* 3 Yale J. on Reg. 283 (1986) 5

Sunstein, *Judicial Review of Administrative Action in a Conservative Era,* 39 Admin. L. Rev. 353 (1987) 8, 11

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BRIEF AMICUS CURIAE OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

STATEMENT OF INTERESTS

Amicus AMERICAN IMMIGRATION LAWYERS ASSOCIATION is a national association of practicing lawyers and law school professors who practice and teach in the fields of immigration and nationality law. AILA has as its objectives, to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence therein; to promote reforms in the laws with regard thereto, and to facilitate the administration of justice therein; and to

evaluate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration, nationality, and naturalization matters.

The membership of amicus practice regularly before the Immigration and Naturalization Service (hereinafter INS) in all of its districts nationwide, (hereinafter EOIR), and before the Board of Immigration Appeals; amici appear as well before the federal district courts and federal circuit courts of appeal of the United States, and have argued matters of immigration, nationality, and naturalization law before the Supreme Court of the United States.

AILA has a direct and serious interest in the development of the immigration law and in the case now before this Court. The issue upon which the court has granted *certiorari* directly involves the practice of immigration law and the interest of AILA's members. Whether qualifying aliens in deportation proceedings will be able to continue or seek employment during the pendency of deportation proceedings is of direct interests to AILA's membership and the clients of its members.

The familiarity of amicus with the nature of the proceedings involved, and the public interest at stake lead amicus to believe the court would benefit from the additional legal argument and interpretation with respect to the substantive question of law here at issue.

SUMMARY OF ARGUMENT

Deference to the INS interpretation of 8 U.S.C. § 1252(a)(1) is neither required nor appropriate under the circumstances of this case. The INS is not entitled to the deference required by *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* does not require deference to an agency assessment of its own authority. *Chevron* deference does not apply to an interpretative question where the issue concerns the scope of the agency's own authority.

Chevron deference is not warranted in the circumstances of this case. The statutory scheme is neither technical, nor complex. Moreover, the agency's position is a dramatic change from its past policy which entitles it to less deference.

Congress' intent with regard to the statute is in any event clear. The plain meaning of the statute only authorizes consideration of whether a bond will secure the alien's appearance at the deportation hearing or a determination as to whether he presents a security risk. Utilizing the traditional tools of statutory construction, Congress' intent is apparent.

Section 1252 considered within the context of the statute as a whole is clear and the regulation is not authorized. Finally, even if the statute were found to be ambiguous, the Attorney General's regulation is unreasonable and should be rejected.

ARGUMENT

I. DEFERENCE TO THE INS'S INTERPRETATION OF 8 U.S.C. SEC. 1252(a)(1) IS NEITHER REQUIRED NOR APPROPRIATE UNDER THE CIRCUMSTANCES OF THIS CASE

The principal issue before the Court is whether the Attorney General[1] may in the exercise of his discretion under 8 U.S.C. sec. 1252(a)(1) (1988) establish a blanket rule requiring the inclusion of "no work" conditions in the release bonds authorized by the statute. Both respondents and the Court of Appeals read sec. 1252(a)(1) to preclude such a blanket rule. Petitioners[2] assert a contrary reading of the statute, and claim that

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1. The challenged regulation was promulgated by the Immigration and Naturalization Service ("INS") in the exercise of authority delegated to it by the Attorney General. *See* 8 C.F.R. 2.1 (1991). This brief refers to the Attorney General and the INS interchangeably with respect to the scope of authority issue.

2. Petitioners are referred to herein collectively as "the INS."

their reading is entitled to deference under *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The INS's reliance on *Chevron* as a basis for deferring to the agency's interpretation is inapposite in the present case for at least three reasons. First, *Chevron* simply does not apply under the circumstances presented. Second, even if *Chevron's* analysis applies to the interpretive task at hand, Congress' intent is clear and thus deference is inappropriate. Third, even if Congress' intent were not clear, deference would be unwarranted because the agency's interpretation is impermissible and unreasonable. This brief addresses these three reasons in turn.

A. *Chevron* Does Not Apply Under the Circumstances of this Case

1. *The Chevron Standard*

Chevron established a two step process under which the courts are to ascertain whether to defer to an administrative agency's interpretation of a statute which the agency is charged with administering. It first requires an assessment of "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842-43. Where the court can ascertain Congress' intent, effect is to be given to that intent and thus the agency's views are irrelevant. *Id. See also Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 368 (1986) ("[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress"). Where the court using the traditional tools of statutory construction cannot discern Congress' intent with respect to an issue, it is to defer to a permissible agency interpretation of the statute. 467 U.S. at 843. *See also INS v. Cardoza-Fonseca,* 480 U.S. 421, 446-48 (1987).

2. *Chevron's deference requirement applies only to some kinds of interpretive questions and only under some circumstances*

In the present case, the INS asserts that because the question before the Court involves statutory interpretation, the agency interpretation is entitled to deference under *Chevron*. Pet. Brief at 33. This ignores the fact that the term "statutory interpretation" refers to a variety of distinct interpretive tasks, some of which are appropriate for deference under *Chevron* and some of which are not. *See Cardoza-Fonseca,* 480 U.S. at 448 (differentiating between kinds of interpretive tasks in context of determining the appropriateness of deferring to agency interpretation of statutes). *See also Homemakers North Shore, Inc. v. Bowen,* 832 F.2d 408, 412 (7th Cir. 1987) (Easterbrook, J.) ("[d]ifferent statutes transfer different sorts of implementing authority to agencies, and therefore there is not one but many standards of deference when agencies interpret statutory language").

Although some uncertainty exists with respect to the precise scope of *Chevron's* deference requirement, *compare Cardoza- Fonseca,* 480 U.S. at 446-48 (majority opinion discussing the circumstances under which deference to an agency is appropriate) *with id.* at 453-455 (Scalia, J., concurring in the judgment, and disagreeing with the majority's characterization of the scope of *Chevron's* deference requirement); *see also* Anthony, *Which Agency Interpretations Should Get Judicial Deference? – A Preliminary Inquiry,* 40 Admin. L. Rev. 121, 126-27 (1988) (noting the uncertainty with respect to *Chevron's* scope); Starr, *Judicial Review in the Post-Chevron Era,* 3 Yale J. on Reg. 283, 299-300 (1986) (noting unresolved issues regarding *Chevron's* scope), the INS cannot be correct in its suggestion that *Chevron* requires deference to an agency position merely because a question of statutory interpretation is at issue. Because administrative agencies derive their authority solely from statutes, *see* Schwartz, B., *Administrative Law* 10

(3d ed. 1991) ("[t]he administrative agency is a creature of the legislature . . ."), every action taken by a federal administrative agency in some sense entails statutory interpretation. Acceptance of the INS's position would favor the virtual abdication of the courts' reviewing function with respect to administrative action. Thus, despite some language in the case which might be read to require across-the-board, unequivocal deference in the face of statutory ambiguity, the sounder reading of *Chevron* requires deference only with respect to some types of interpretive questions, and only under some circumstances. Rather than stating an absolute requirement of deference, *Chevron* simply establishes a strong preference or presumption in favor of an agency interpretation of an ambiguous statutory term, which can be overcome in an appropriate case. What constitutes an appropriate case for deference depends upon two factors: the type of interpretive question at issue and the circumstances under which the agency has acted.

The text of the *Chevron* decision supports this view. In Chevron, the decision as to whether to defer to the agency interpretation rested at least in part upon the type of interpretive task at hand and the appropriateness of deferring under the circumstances:

> In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases.

467 U.S. at 865. *See also id.* at 848 (noting that the statutes at issue "are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue."); *Cardoza-Fonseca,* 480 U.S. 421 (demonstrating

that the deference principle does not apply in every case of agency interpretation of statutes within its charge); *NLRB v. United Food & Commercial Workers' Union,* 484 U.S. 112, 123-24 n.20 (1987) (considering in determining the appropriateness of deference the consistency of the agency's interpretation with its past pronouncements).

3. *Chevron does not require deference to an agency assessment of its own authority*

As *Chevron* itself demonstrates, deference to an agency interpretation applies where the traditional tools of statutory construction fail to produce a conclusive determination of the meaning of what might be called a substantive statutory term. Where, on the other hand, the interpretive question at issue involves the scope of the agency's authority, deference is neither warranted nor appropriate.

In *Chevron,* the Court deferred to the EPA's interpretation of the term "stationary source" as it was used by Congress in the 1977 amendments to the Clean Air Act. 467 U.S. at 866. In a series of post-*Chevron* cases, the Court has applied the *Chevron* analysis to agency interpretations of such substantive provisions. *See, e.g., Department of Transp. v. Paralyzed Veterans,* 477 U.S. 597, 612-13 n.14 (1986) (applying *Chevron* to construction of the statutory term "Federal financial assistance"); *Connecticut Dep't of Income Maintenance v. Heckler,* 471 U.S. 524, 530 (1985) ("[i]n the absence of a statutory definition of the term 'institution for mental diseases,' it is appropriate to consider the Secretary's interpretation of that term."); *United States v. Boyle,* 469 U.S. 241, 246 n.4 (1985) (applying *Chevron's* deference requirement to construction of the statutory term "reasonable cause").

Properly understood, *Chevron* does not require deference when the interpretive question at issue concerns the scope of the agency's own authority. Although this distinction has been expressly addressed infrequently in this Court's case law, Justice Brennan in his dissenting

opinion in *Mississippi Power & Light v. Mississippi ex rel. Moore,* 487 U.S. 354, 387 (1988), identified the problem and properly concluded that *Chevron* deference is inappropriate where the agency has construed a statute designed to confine the scope of its own jurisdiction. While the statute at issue here cannot be so characterized, Justice Brennan's reasoning applies with equal force to the construction of statutory terms which go to the scope of the agency's authority to act.[3] A contrary reading of *Chevron* would inappropriately render the agencies the judges of their own cause. *See* Sunstein, *Judicial Review of Administrative Action in a Conservative Era,* 39 Admin. L. Rev. 353, 368 (1987) (panel discussion) (urging the rejection of a broad reading of *Chevron* in part because "those who are limited in their authority by law should not be the judge of those limits.").

This Court has demonstrated its willingness to disregard *Chevron* in a variety of interpretive contexts. For example, the Court has chosen not to refer to *Chevron's* deference requirement when construing non-substantive statutory terms concerning federal court jurisdiction to review administrative action. Thus, *McNary v. Haitian*

3. Justice Brennan noted in *Mississippi Power* that the Court has in some instances deferred to agency determinations with respect to scope of authority. 487 U.S. at 387. Such cases, however, concerned either statutes under which Congress had allocated such authority to the agency, *see Commodities Futures Trading Comm'n v. Schor,* 478 U.S. 833, 844 (1986) (the "the CFTC's long-held position that it has the power to take jurisdiction over counterclaims such as [that at issue] is eminently reasonable and *well within the scope of its delegated authority*") (emphasis added), or legislative schemes under which agency expertise is deemed to be useful in determining the scope of authority, *see NLRB v. City Disposal Systems,* 465 U.S. 822, 829-30 (1984) (relying in part on an agency expertise explanation for deferring to the NLRB's view of the scope of its authority under section 7 of the National Labor Relations Act).

Although some justices have favored application of *Chevron* to questions concerning the scope of an agency's authority, *see, e.g., Dole v. United Steelworkers of America,* 110 S. Ct. 929, 944 (1990) (White, J., dissenting); *Mississippi Power & Light Co.,* 487 U.S. at 380-82 (Scalia, J., concurring), a majority of the Court has never expressly rejected Justice Brennan's analysis.

Refugee Center, 111 S. Ct. 888, 896-97 (1991), rejects the INS's interpretation 8 U.S.C. sec. 1160(e)'s judicial review provision without reference to deference to the agency's views.[4] Similarly, in *Cardoza-Fonseca,* 480 U.S. 421, the Court carefully examines the relevant statutes' plain meaning and legislative history with no suggestion that the INS's interpretation is entitled to deference. *Id.* at 421-43. The Court then expressly rejects the INS's assertion that such deference is required. Id. at 445. It distinguishes between "pure questions[s] of statutory construction" and the application of legal terms to particular circumstances. Pure legal questions are "for the courts to decide." Thus, as was the case in *Cardoza-Fonseca* itself, no deference is to be afforded. Questions concerning the application of legal standards to given facts are at least under some circumstances allocated to the agency by Congress, and thus the courts will defer to a reasonable agency construction. *Id.* at 446-48. *See also INS v. Stevic,* 467 U.S. 407 (1984) (decision released several weeks before *Chevron* in which no deference was afforded to the INS's resolution of a pure question of law).

The principal issue before the Court in this case is whether the INS acted outside the scope of the authority allocated to the Attorney General by Congress in 8 U.S.C. sec. 1252(a)(1). *See National Center for Immigrants' Rights, Inc. v. INS,* 913 F.2d 1350, 1358 (9th Cir. 1990) (characterizing the issue as whether the challenged regulation is beyond the statutory authority conferred on the Attorney General). The INS accepts this characterization in arguing that the challenged

4. Although one could assert that *Chevron* does not apply under these circumstances because the agency is not charged with "administering" the judicial review provision at issue, *see* 467 U.S. at 842, the provision is part of the Immigration and Nationality Act, 8 U.S.C. sec. 1101 *et seq.* (1988), as amended by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, and thus is a part of the legislative scheme which it is the INS's principal task to administer.

regulation reflects a policy change but not a reassessment of the agency's view of its statutory authority. Pet. Brief at 34. Such questions of agency authority turn upon whether the agency's action was ultra vires and thus invalid.[5]

Under section 1252(a)(1), when an individual has been taken into custody pending a determination of deportability, the Attorney General is authorized to exercise discretion with respect to whether that individual shall remain in custody, be released under bond "containing such conditions as the Attorney General may prescribe," or be released on conditional parole. Respondents assert, and the Court of Appeals agreed, 913 F.2d at 1374, that this authority does not extend to the imposition of a blanket rule requiring "no work" conditions in release bonds.

Such disputes over whether the agency's actions were ultra vires are fundamentally different from *Chevron*-type disagreements over the meaning of a substantive term. In the latter cases, deference is a judicial response to uncertainty with respect to where Congress wished to allocate the interpretive authority with respect to a particular statutory term. In the event of such uncertainty over whether the agency or the courts have been charged with interpreting a statutory term, *Chevron* states a rule under which in some circumstances the courts will assume that Congress intended for the agency to decide. *Cf. Department of the Treasury, IRS v. FLRA,* 110 S. Ct. 1623, 1629 (1990)

5. Alternatively, the question before the Court could be cast as whether the INS abused its discretion in promulgating the work authorization regulations. Section 1252(a)(1) undoubtedly vests discretionary authority in the Attorney General – the question before the Court is whether the delegatee of that authority has abused the discretion afforded. Under these circumstances, to defer to the INS interpretation of sec. 1252 would permit the agency to determine whether or not it had abused its own discretion. Such deference would preclude meaningful judicial review of agency discretionary decisions.

("when an agency is charged with administering a statute part of the authority it receives is the power to give reasonable content to the statute's textual ambiguities."); *Adams Fruit Co. v. Barrett,* 110 S. Ct. 1384, 1390 (1990) ("[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority."). *See also* Scalia, *Judicial Deference to Administrative Interpretations of Law,* 1989 Duke L.J. 511, 516. When the interpretive task concerns the scope of the agency's authority, however, such uncertainty with respect to interpretive responsibility is not at issue. It makes little sense under such circumstances to assume that Congress intended for the agency to determine the contours of its own power. A contrary interpretation of *Chevron's* scope would violate the sound proposition that "foxes shouldn't guard henhouses." Sunstein, *supra* p. 8, at 368.

The refusal to extend *Chevron's* deference requirement where the interpretive task concerns whether the agency's action was ultra vires is sound. Because the administrative agencies do not operate under a direct grant of power from the Constitution, they are entirely dependent upon Congress for their authority. *See Chrysler Corp. v. Brown,* 441 U.S. 281, 302 (1979) ("[t]he legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes."); Schwartz, B., *Administrative Law* 171 (3d ed. 1991) (noting that application of the notion of ultra vires to administrative action is "inherent in the constitutional positions of agencies and courts."). Thus the rigorous application of the ultra vires doctrine is essential to the maintenance of a government within the confines of the existing Constitution, and is well within the courts' constitutionally-established function. Given the particular importance of scope of authority questions in the agency context, the most appropriate construction of

Chevron is to limit its application to interpretive tasks which concern the meaning of a substantive statutory term where Congress has not clearly allocated interpretive responsibility. *Cf. Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 593-94 (1952) (Frankfurter, J., concurring) ("[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.").

Finally, application of *Chevron's* deference requirement to scope of authority questions would afford the administrative agencies a privileged status not afforded to the constitutionally established political branches. At least since *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), the courts have passed on the constitutionality of the actions of the political branches. Where the courts hold actions by Congress or the President to be unconstitutional, they are in a sense saying that the action was ultra vires, *i.e.,* that the action exceeded the actor's authority under the enabling text. For example, the Court invalidated Congress' efforts to use the legislative veto as a check on executive branch action in *INS v. Chadha,* 462 U.S. 919 (1983). Similarly, in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. at 587-88, the Court precluded President Truman's efforts to seize U.S. steel mills during a labor dispute. In these cases and dozens of others, the Court displaced the political branches assessment of the scope of their own authority. *See, e.g., United States v. Eichman,* 110 S. Ct. 2404 (1990) (invalidating the federal Flag Protection Act of 1989); *Bowsher v. Synar,* 478 U.S. 714 (1986) (invalidating portion of the Gramm-Rudman-Hollings Act); *United States v. Nixon,* 418 U.S. 683 (1974) (rejecting President Nixon's characterization of the scope of executive privilege). Whatever *Chevron* means, it should not be construed so as to shield the agencies from review for ultra vires action to a greater extent than the

constitutionally-established political branches are shielded in analogous circumstances.[6]

4. *Chevron only requires deference where the circumstances warrant deference to the agency interpretation*

The INS's talismanic invocation of *Chevron* is also inappropriate because a proper application of that case looks to the circumstances before affording deference to the agency's determination.

The Court in *Chevron* expressly referred to the circumstances in explaining the deference requirement. *See* 467 U.S. at 865 (noting that the statutory amendments at issue were "technical and complex" and that the agency "considered the matter in a detailed and reasoned fashion"). Moreover, despite some categorical language in *Chevron,* this Court has routinely considered the circumstances of a given case in deciding whether deference is to be given to the agency's interpretation. In perhaps the best known example, the Court declined to apply *Chevron's* deference requirement to a pure question of law in *Cardoza-Fonseca.* 480 U.S. at 446-48. A variety of other factors, such as the complexity of the regulatory scheme at issue, the extent to which the agency interpretation is the product of agency counsel's post hoc rationalizations, and the consistency or long-standingness of the agency interpretation, have also been considered. *See, e.g., Bowen v. Georgetown*

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6. One could argue with respect to the actions of Congress and the President that the presumption in favor of the constitutionality of the political branches' actions, *INS v. Chadha,* 462 U.S. at 944 (courts begin with the presumption that Congress' acts are valid); *Dames & Moore v. Regan,* 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. at 637 (Jackson, J., concurring)) (applying same principle to presidential action), functions much like the *Chevron* deference requirement. The analogy is, however, flawed. The presumption in favor of the political branches does not result in the minimal scrutiny which frequently results under *Chevron's* reasonableness inquiry.

Univ. Hosp., 488 U.S. 204, 212-13 (1988) (declining to defer to agency interpretations which were mere litigation positions); *NLRB v. United Food & Commercial Workers' Union*, 484 U.S. 112, 123-24 n.20 (1987) (expressly considering the consistency of the agency's interpretation with its past pronouncements in determining the appropriateness of deference); *Cardoza-Fonseca*, 480 U.S. at 446 n.30 (identifying inconsistency with past agency interpretations as additional reason for declining to defer); *Young v. Community Nutrition Inst.*, 476 U.S. 974, 981 (1986) (quoting *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985)) (referring to the statute's complexity in explaining deference to agency's interpretation); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 438-39 (1986) (expressly referring to the circumstances of the case in concluding that deference should be afforded to the agency's statutory interpretation); *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524, 528 (1985) (noting long-standingness of agency interpretation). *See also EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 125 (1988) (O'Connor, J., concurring in part and concurring in the judgment) (noting that deference is particularly appropriate with respect to "technical issue[s] of agency procedure.").

5. *The circumstances of the present case do not warrant deference to the INS's interpretation of sec. 1252(a)(1)*

Numerous factors weigh against judicial deference to the INS's interpretation of sec. 1252(a)(1).

First, the agency's interpretation is neither consistent nor longstanding. This Court has recently stated, "as a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views". *Pauley v. Bethenergy Mines, Inc.*, 59 U.S.L.W. 4778, 4783 (June 25, 1991) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988)).

Unlike in *Pauley*, the Attorney General, the Immigration Service, and the Board of Immigration Appeals have not held "unswervingly" to the view that a no work rider can be attached to immigration bonds. The Immigration and Nationality Act was passed in 1952. The Immigration Service first promulgated the regulations here at issue in 1983. Prior to that time, the Immigration Service had never promulgated a regulation, nor for that matter, taken a position in adjudications that it had the authority to impose a blanket no work rider on immigration bonds.

The Attorney General's delegate, the Board of Immigration Appeals consistently held that an alien was not to be detained or required to post bond unless he either posed a threat to national security or was a poor bail risk. *See Matter of Patel*, 15 I&N Dec. 666 (1976) and *Matter of Spiliopoulos*, 16 I&N Dec. 561 (1978). As these decisions reflect, the Board consistently held that employment was a positive factor in bond determinations as it reflected an attachment to the community which made it more likely that the alien would appear at his or her deportation hearing. The absence of employment was considered a negative factor justifying a substantial bond. *See Matter of Shaw*, 17 I&N Dec. 177 (1979). *See also Matter of Andrade*, 19 I&N Dec. 488 (1987). Thus, the Board has consistently viewed its task in bond determination proceedings to be limited to a determination of whether the alien posed a security risk or a risk of flight. A stable employment history was consistently considered a favorable factor.

In *Matter of Toscano-Rivas*, 14 I&N Dec. 523 (BIA, 1973)(AG 1974), the Immigration Service first asserted a right to have a condition in a bond that an alien not seek or continue unauthorized employment. However, the INS assertion of this authority was based on the "peculiar factual situation" of the case. *Toscano-Rivas*, at 528. The Board held the no-work condition to be an impermissible use of the detention power.

The matter was reviewed by the Attorney General who concluded that the statute did authorize "in at least some circumstances" a bar against unauthorized employment in deportation bonds. The Attorney General also held that such conditions must be specifically governed by a published regulation of the Service. Lacking such a regulation, the Attorney General sustained the Board's decision. *Toscano-Rivas,* at 553 and 556. The Attorney General did not assert a right to no-work conditions in a bond on an across-the-board basis. Moreover, the Attorney General's decision reflects the attempt to impose such a bond rider even on a case-by-case basis as an abrupt change from past practice.

Finally, the Immigration Service has not provided a detailed and reasoned explanation so as to justify its change in policy. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Mobile Ins. Co.,* 463 U.S. 29, 57 (1983).

Second, the agency lacks expertise with respect to the purported objective of the challenged regulation, and thus one of the traditional justifications for deferring to an agency's interpretation is lacking. The INS's purported justification for the challenged regulation is the protection of the United States' labor markets from an influx of alien labor. *See* Pet. Brief at 26-27. Neither the Attorney General nor the INS have particular expertise with respect to either labor market conditions or the likely impact that the challenged regulation would have on persons seeking employment in the United States. To the extent that the INS can be said to have expertise, it is not in the area of labor economics, but in the admission of aliens into the United States.

Third, unlike *Chevron* and many of its progeny, this case does not require an analysis of technical or scientific data. The challenged regulation relates to a straightforward regulatory scheme which cannot be cast as "technical" in the *Chevron* sense of the term. In cases involving technical or scientific matters, deference is

afforded at least partly to increase the likelihood that a sound decision will be made. *See* Scalia, *supra* p. 11, at 514 (stating that where expertise is at issue the agency is thought more likely to reach the right result). Where no such data is at issue, deference does not increase the chances that the best result will be reached.

6. *Conclusion*

Properly understood, *Chevron* does not state a lock step rule of deference whenever an agency takes a position with respect to the meaning of a statute which it is charged with implementing. Instead, *Chevron* requires deference to reasonable agency interpretations of substantive statutory terms unless such deference is inappropriate or unwarranted under the circumstances. Deference to the INS's position is inappropriate in the present case on both of these grounds. First, the interpretive task does not concern a substantive term, but rather concerns whether the INS stayed within the contours of the authority afforded to the Attorney General by Congress. Second, the circumstances of this case do not favor such deference.

B. Even if *Chevron* Does Apply Under the Circumstances of this Case, Deference Should Not be Afforded to the INS's Interpretation of Section 1252(a)(1) Because Congress' Intent is Clear

Even under a *Chevron* analysis, the INS's interpretation of sec. 1252(a)(1) must be rejected because Congress' intent is clear from the text the statute, the Immigration and Nationality Act taken as a whole, and the legislative history of the relevant provisions.

Under *Chevron,* the courts are to defer to a reasonable and permissible agency interpretation of a statute only in the event of uncertainty over the statute's meaning. 467 U.S. at 844-45. Where no such uncertainty exists, effect must be given to Congress' intent and thus deference is inappropriate. *Id. See also Dole v. United Steelworkers of America,* 110 S. Ct. 929, 938

(1990). In ascertaining whether Congress' intent with respect to a given question may be discerned, the courts are to employ the traditional tools of statutory construction. *See Cardoza-Fonseca,* 480 U.S. at 446-48 ("[e]mploying the traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical."). *See also Chevron,* 467 U.S. at 843 n.9 (referring to the judiciary as the "final authority on issues of statutory construction"). This initial inquiry regarding legislative intent entails the judicial assessment of the specific provision's text, the language and design of the statute as a whole, and the statute's legislative history. *See, e.g., Sullivan v. Everhart,* 110 S. Ct. 960, 964 (1990) ("[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.") (quoting *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 291 (1988)); *Regents of Univ. of Cal. v. Public Employment Rel. Bd.,* 485 U.S. 589, 597-602 (1988) (declining to defer to the agency interpretation because Congress' intent could be discerned from an analysis of statutes and their legislative history); *Bethesda Hosp. Ass'n v. Bowen,* 485 U.S. 399, 403 (1988) (declining to defer to agency interpretation where the plain meaning of the statute and the language and design of the statute indicate Congress' intent); *Japan Whaling Ass'n v. American Cetacean Soc'y,* 478 U.S. 221, 233 (1986) (noting that the courts will afford deference under Chevron "unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress."); *United States v. City of Fulton,* 475 U.S. 657, 666-67 (1986) (considering the legislative history of the relevant statute in order to ascertain Congress' intent).

1. *The statutory language*

The plain language of sec. 1252(a)(1) and sec. 1252 taken as a whole demonstrate that the INS's interpretation is inconsistent with Congress' intent with respect to bond conditions.

Section 1252(a)(1) addresses the scope of the Attorney General's authority with respect to the arrest, custody and release of persons subjected to deportation proceedings. It provides the Attorney General with considerable flexibility in determining whether a given individual will remain in custody, be released under bond, or released on conditional parole. With respect to release on bond, sec. 1252(a)(1) permits the inclusion in such bonds of "such conditions as the Attorney General may prescribe . . ." The INS reads this authority broadly, claiming that bond conditions need only be rationally related to the purposes of the immigration laws. *See* Pet. Brief at 14 (asserting that sec. 1252(a)(1) authorizes those conditions "designed to serve any of the policies of the Immigration and Nationality Act.").

The INS's interpretation is cut from whole cloth. It ignores the plain meaning of the terms "bond" and "discretion," and it fails to consider the bond conditions provision in the context of sec. 1252 as a whole.

The plain meaning of the term "bond" as used in sec. 1252(a)(1) establishes Congress' intent with respect to the kinds of release conditions which the Attorney General may impose. *Black's Law Dictionary's* definition of "bond" in the context of detention or incarceration refers to its definition of "bail." "Bail" is repeatedly defined in terms of ensuring an individual's appearance at later proceedings. For example, "bail" is defined as "[t]o procure release of one charged with an offense by insuring his future attendance in court and compelling him to remain within jurisdiction of court." *Black's Law Dictionary* 127-28 (5th ed. 1979). In differentiating between civil and criminal bail, it states that "[t]he object of 'bail' in civil cases is either directly or indirectly to secure payment of a debt or performance of

other civil duties, while in criminal cases object is to secure appearance of principal before the court when his presence is needed."[7] *Id.*

This Court's case law is consistent with this understanding of the term "bond." *Yanish v. Barber,* 73 S. Ct. 1105 (Douglas, Circuit Justice 1953), concerned the scope of the Attorney General's discretion to impose bond conditions under 8 U.S.C. sec. 1252(c). Section 1252(c), a provision analogous to sec. 1252(a)(1), concerns the treatment of persons subject to deportation proceedings after a final order of deportation has been entered. The bond condition language in the two provisions is identical.[8]

In *Yanish,* the subject of deportation proceedings had been free on bond pending resolution of the proceedings. The INS requested that he execute a bond containing new conditions, including several which related to association with communist organizations or with persons who associate with such organizations. When the alien refused to execute the new bond, he was taken into custody. He filed a petition for habeas corpus, alleging that the Attorney General had abused his discretion in seeking to impose the new bond conditions. The district court rejected the petition, and denied bail pending appeal. The issue before Justice Douglas was whether the appeal raised a "substantial question," in which case bail pending appeal should be allowed. *Id.* at 1106-07. In explaining his conclusion that the questions raised were substantial, Justice Douglas first noted that "[t]he function of bail in situations such as the instant

7. Although deportation proceedings are civil in nature, *see Carlson v. Landon,* 342 U.S. 524, 533 (1952), the incarceration and hence the bonding process is more closely analogous to criminal practice.

8. Both sec. 1252(a)(1) and sec. 1252(c) refer to release on bond "containing such conditions as the Attorney General may prescribe." The INS concedes that under sec. 1252(c) "the Attorney General retains the same authority to detain or to impose conditions as under subsection (a)(1)." Pet. Brief at p. 16 n.8.

one is to provide security for the appearance of the prisoner on the one hand and to protect his right to appeal, on the other." *Id.* at 1108. He then questioned how the imposition of conditions related to the alien's associational activities could further the purpose of bail. *Id.* at 1108. *See also In re Milburn,* 34 U.S. (9 Pet.) 704, 709 (1835) (Story, J.) (emphasizing that the purpose of bond in the criminal context is to ensure a party's appearance at later proceedings); *Reynolds v. United States,* 80 S. Ct. 30, 32 (Douglas, Circuit Justice 1959) ("[t]he purpose of bail is to insure the defendant's appearance and submission to the judgment of the court."). *Cf. Rubenstein v. Brownell,* 206 F.2d 449, 456 (D.C. Cir. 1953) (noting in the context of the Attorney General's authority to arrest persons under sec. 1252 that imprisonment on the basis of the appellant's criminal record or his unpopularity would constitute an abuse of discretion), *aff'd per curiam by an equally divided Court,* 346 U.S. 929 (1954).

In using the term "bond" in sec. 1252(a)(1), Congress can be presumed to have known that bond conditions in this context refers to conditions intended to secure appearance at later proceedings. The INS construes sec. 1252(a)(1) to afford the Attorney General the ability to detain persons whose status has yet to be ascertained for undetermined lengths of time in order to further any permissible objective of the immigration laws. When the plain meaning of "bond" as used in this context is considered, this interpretation is absurd.

The INS also failed to read the bond condition provision in context. It is apparent from sec. 1252 taken as a whole, which is concerned with the procedures to be followed in the event that an individual is to be the subject of deportation proceedings, that the conditions imposed must be related to ensuring the individual's later appearance. Nothing in sec. 1252's detailed provisions supports the view that the procedural devices

outlined may be used as the Attorney General sees fit to further any of the myriad purposes of the immigration laws.

This understanding of "bond" is consistent with the legislative history of a predecessor bill to the 1950 legislation which contained the present sec. 1252(a)(1). Both the House and Senate reports on that bill referred to the Attorney General's "untrammeled" authority to impose bond conditions, but went on to list as examples conditions that were to be applied on an individualized basis and which only concerned either ensuring appearance at the hearing or the amount of the bond. H.R. Rep. No. 1192, 81st Cong., 1st Sess. at 6 (1949); S. Rep. No. 2239, 21st Cong., 2d Sess. at 5 (1950) (cited in *National Center for Immigrants' Rights, Inc.*, 913 F.2d at 1359).

The INS's interpretation is also inconsistent with the plain meaning of the term "discretion" as that term is used in sec. 1252(a)(1). "Discretion" by definition when used in this context requires some individualized consideration of the circumstances surrounding the person being subjected to deportation proceedings. *See Cardoza-Fonseca,* 480 U.S. at 444 (referring to the Attorney General's discretion to grant asylum as a congressional assignment of "the task of making these hard individualized decisions"). *See also Black's Law Dictionary* 419 (5th ed. 1979) (defining discretion as applied to public officers as the "power to act in an official capacity in a manner which appears to be just and proper *under the circumstances")* (emphasis added).[9]

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9. This definition of deference as requiring an individualized assessment is consistent with the cases relied upon by the INS in support of its assertion that an agency may use rulemaking to resolve questions of general applicability even where individualized determinations are required. Pet. Brief at 38-41. The cases cited by the INS are distinguishable because they involved questions of general applicability which were relevant to the requisite individualized determinations. *See, e.g., Heckler v. Campbell,* 461 U.S. 458, 467 (1983) (permitting resolution of questions concerning the availability of employment in the national economy through rulemaking in the context of individual disability determinations). The regulation challenged in the present case does not concern questions of general applicability. Instead, it ignores individual circumstances and imposes a blanket prohibition regardless of circumstances. The cases cited by the INS do not support such agency action.

This understanding is consistent with the Court of Appeals' construction of the scope of the Attorney General's discretion under sec. 1252(a)(1). The court discerned from a thorough review of the case law on the scope of the discretion at issue "an unmistakable emphasis on the situation of each individual as the focus of the exercise of discretion." 913 F.2d at 1363-64. The court stated further that "[t]he significant power which is placed in the Attorney General must be exercised on the specific, individual circumstances of the person who faces the determination of his alienage or deportability under this statutory section." *Id.* Finally, the court concluded by noting that "[i]nformed discretion is incompatible with a blanket no- work rule." *Id.* at 1374. *See also Carlson v. Landon,* 186 F.2d 183, 188-89 (9th Cir. 1950), *aff'd on other grounds,* 342 U.S. 524 (1952) (requiring an individualized assessment in the exercise of the Attorney General's discretion under the Internal Security Act with respect to release under bond). Moreover, this Court has accepted an analogous argument in the Social Security disability context. *See Sullivan v. Zebley,* 110 S. Ct. 885 (1990) (relying upon Congress' intent to provide for individualized determinations in rejecting agency's efforts to make disability determinations through rulemaking process).

Thus, the challenged regulation is inconsistent with Congress' clear intent in a variety of respects. It ignores the plain meaning of the terms "bond" and "discretion," and ignores the context in which sec. 1252(a)(1) affords discretion to the Attorney General with respect to bond conditions.

2. *Section 1252(a)(1)'s role in the Immigration and Nationality Act as a whole and the legislative history*

Section 1252(a)(1) is part of the extensive federal immigration and naturalization regulatory scheme which is largely contained in the Immigration and Nationality Act, 8 U.S.C. sec. 1101 *et seq.* ("the INA"). The INS's interpretation of sec. 1252(a)(1) is inconsistent with the language and structure of the INA, particularly with the employment-related amendments to the INA contained in the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359.

As the INS conceded in its commentary on the challenged regulation, persons who violate the no work condition of a release bond would be incarcerated. *See* 48 Fed. Reg. 51142 ("[w]here the 'no work' condition is violated, the appropriate response would be to take the alien into custody.") Thus, the INS interprets sec. 1252(a)(1) to permit the punishment of the individual for violation of a "no work" condition. Moreover, even absent re-incarceration for violation of a bond condition, the blanket rule requiring no work conditions is likely to make obtaining release from detention more difficult. *See National Center for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1357 n.7 & accompanying text (9th Cir. 1990). This interpretation of sec. 1252(a)(1) is flatly inconsistent with Congress' intent with respect to unauthorized work by aliens.

Both the employment-related provisions and the legislative history of IRCA demonstrate Congress' intent to limit unauthorized employment not through penalizing the alien worker, but through employer sanctions. The Court of Appeals described the relevant portions of IRCA and its underlying policy as follows:

> [T]he principal sanctions in IRCA are aimed at employers. Section 101 of the Act establishes penalties making employment of unauthorized aliens unlawful. 8 U.S.C. sec. 1324a. The employer is required to keep records of the verification of employees' eligibility to work. 8 U.S.C. sec. 1324a(b)(1)(C). Civil and criminal penalties are provided for violations. 8 U.S.C. sec. 1324a(e), (f).

913 F.2d at 1367.

The Court of Appeals, after carefully summarizing IRCA's legislative history with respect to unauthorized employment, properly concluded that IRCA did not authorize the Attorney General to promulgate the challenged regulation. *Id.* at 1366-70.

C. Even if the Court Concludes that sec. 1252(a)(1) is Ambiguous with Respect to the Attorney General's Authority to Impose a Blanket Condition Unrelated to Assuring Appearance at the Hearing, the INS's Interpretation Should be Rejected as Impermissible and Unreasonable

Even if the Court concludes that *Chevron* does apply to the type of interpretive questions at issue and that sec. 1252(a)(1) is ambiguous with respect to the Attorney General's authority, it should reject the agency's interpretation as both unreasonable and impermissible.

In assessing the reasonableness of the agency's interpretation, the Court is to consider that interpretation "in light of the language, policies, and legislative history of the [statute] . . ." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985). Given that the reasonableness inquiry largely looks to the same factors as those considered in the first part of the *Chevron* analysis, amicus curiae refers to the foregoing discussion to demonstrate that the INS's interpretation is unreasonable. *See* supra at 17, 18, and 19.

Additionally, the INS's interpretation of sec. 1252(a)(1) is unreasonable for reasons unrelated to issues of legislative intent. For example, although the purported justification for the no work authorization is to preserve employment opportunities for U.S. citizens by creating a disincentive to those who wish to travel to the

United States to obtain employment, *see* Pet. Brief at 6 ("[b]y placing the burden on these aliens, INS intends to remove an economic incentive for illegal entry, and also to remove an incentive to delay deportation proceedings when an alien is apprehended."), the empirical data belies this explanation. As the Court of Appeals noted, the "no work" condition regulation affects only a small percentage of those who come to the United States to seek employment. Over 97% of those arrested by the INS take voluntary departure and depart from the United States without a hearing. 913 F.2d at 1369 (citing *INS v. Lopez-Mendoza,* 468 U.S. 1032, 1044 (1989)). Moreover, a portion of those remaining are released on parole rather than bond. *Id.* Thus, the percentage of persons who would be directly affected by the challenged regulation is quite small. When the impact of this small percentage on the incentive effect is considered in conjunction with the questionable constitutionality of the challenged regulation, the regulation cannot be cast as reasonable. *See DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council,* 485 U.S. 568, 574-76 (1988).

Despite the INS's routine invocation of *Chevron,* a proper reading of *Chevron* and its progeny demonstrates that *Chevron's* deference requirement simply is not implicated in this case. Deference would be inappropriate and unwarranted here for at least two reasons. First, interpretive questions regarding the scope of an agency's authority are better resolved by an entity not charged with exercising the power at issue. Second, the circumstances here do not warrant or even favor deference to the INS's interpretation of sec. 1252(a)(1). Moreover, even if *Chevron* applies, Congress' intent is clear from the face of the statute, the INA considered in its entirety, and the relevant legislative history. As Chevron notes, "that is the end of the matter," 467 U.S. at 842, and the agency interpretation is not relevant. Finally, even if the Court finds sec. 1252(a)(1) to be ambiguous with respect to the scope of the agency's

authority, deference should not be afforded because the agency interpretation is both impermissible and unreasonable.

Finally, the regulation is tantamount to an outright denial of employment authorization to all aliens during the pendency of deportation proceedings. The Immigration Service's regulations automatically terminate the employment authorization of all aliens placed in exclusion or deportation proceedings. *See* 8 C.F.R. § 274(a)(1)(ii). Thus, the petitioner's assertion that the no-work bond condition does not eliminate preexisting rights to work either incident to status or by grant of the Immigration Service, is dubious at best. See Petition for Writ of Certiorari, at page 20.

The regulations do permit an application to be filed pursuant to 8 C.F.R. § 274a.12(c)(13) where the District Director determines employment is appropriate. The Immigration Service has up to 60 days to adjudicate the request.

Further, 8 C.F.R. § 103.6(a)(2)(ii) establishes separate criteria requiring that the alien demonstrate "compelling reasons" for seeking employment.

Under the standards set forth in 8 C.F.R. § 274(e), the Immigration Service has demonstrated a failure to comply with its own regulations as to timeliness and the substance of the adjudications. *See, e.g., John Doe I v. Meese,* 690 F. Supp. 1572 (S.D. Tex. 1988) (failure to comply with 60 day deadline resulting in preliminary injunction). *See also Ramos v. Thornburgh,* 732 F. Supp. 609 (E.D. Tex. 1989)(asylum applicants denied employment authorization because of INS application of the regulatory standard).

Lastly, it is clear that the "compelling reasons" standard is unreasonable as it relates to no legitimate purpose. The standard acts simply to deny to the alien the means to remain in the United States to litigate the merits of his or her case. Deportation cases are often complex with the availability of numerous types of discretionary relief provided under the Immigration Act.

The coercive effect of the INS policy is apparent. It is plainly unreasonable and not related to any legitimate interest of the Immigration Service.

CONCLUSION

Amicus American Immigration Lawyers Association urge that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, LAWRENCE H. RUDNICK, Esquire, hereby certify that a true and correct copy of our BRIEF AMICUS CURIAE was served upon Kenneth W. Starr, Solicitor General, Office of the Solicitor General,.Washington, DC 20530, and Peter Schay, NCIR, Inc., 256 S. Occidental Blvd., Los Angeles, CA 90057.

Service was by prepaid First Class Mail.

July 12, 1991

LAWRENCE H. RUDNICK